No 791

UNITED STATES OF AMERICA
IN THE
SUPREME COURT OF THE UNITED STATES

LIVINGSTON E. OSBORNE,
Petitioner,

vs.

A. J. HASTINGS, Sheriff of Berrien County, Michigan,
Respondent.

Case No. 9259

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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(Figures in parentheses refer to pages of printed record of Circuit Court of Appeals unless context clearly indicates otherwise)

I.

OPINION BELOW

The opinion of the Circuit Court of Appeals reversing the judgment for plaintiff in the trial court is reported as *Hastings v. Osborne,* in 131 Fed. (2nd) 396. It will be of interest and perhaps of help to the court to read the companion case of *Optner v. Bolger* 95 Fed. (2nd) 241.

II.

JURISDICTION

Petitioner has not attempted to bring this case within the provisions of Section 5 of Rule 38 of the Rules of this Court. Certainly he has not shown any special or important reasons for the granting of the writ of certiorari. He does not claim nor can it be said that the question here involved is of national or even of very great local im-

portance. Neither does he point out wherein the opinion of the Circuit Court of Appeals conflicts with decisions of the Supreme Court of Michigan with applicable decisions of this Court, nor, for that matter, that it is in conflict with the weight of authority. Although petitioner's criticism of the Circuit Court of Appeals is severe, such criticism is based entirely upon the language of the opinion. As we read the rule, the last clause relates to procedural matters and questions, and no claim is made by petitioner that the appellate court has adopted any such unusual procedure as to constitute a departure from the accepted and usual course of judicial proceedings and make necessary the exercise of the courts power of supervision.

III.

STATEMENT OF THE CASE

In addition to the facts stated in the petition, we should add the following:

When Mr. Abbott made his surrender he stated that he was doing so in his own behalf and upon the behalf of the surety upon his bond. A corporation must act by agents, and Mr. Abbott was acting, not only for himself, but also as an agent of the surety (57).

At the time of surrender to the sheriff of Berrien County, the latter telephoned the United States Marshall at Grand Rapids, Michigan, and he in turn telephoned petitioner's counsel. Mr. Bolger, successor Marshall, requested Mr. Face to advance board and expenses for prisoner. This was in compliance with a Michigan statute set out in the opinion below (142). Mr. Face refused to pay any expenses and stated that "* * * They would not pay a dollar for him and that they were through with the fellow * * *" (69).

Mr. Hastings, defendant, is a successor sheriff, he never heard of the case or knew of it until he was served with process in the instant suit (85-86).

There is another Michigan Statute, Sec. 1358, Mich. C. L. 1929, which requires an outgoing sheriff to turn over all writs, bonds, and official papers with a list of prisoners to his successor. Mr. Hastings never received the bond in this case because the bond at all times had been held by the United States Marshall in the City of Grand Rapids. Even the original sheriff never had it and had never seen it (63).

The record shows further that Mr. Abbott departed from the County of Berrien long before Mr. Hastings became sheriff and had never been in the county thereafter (56). Mr. Abbott opened a law office in Ann Arbor, Michigan, had practiced in Detroit, had been in Chicago, Louisville and Cincinnati; in fact, he came and went as he pleased from 1936 until this suit was started in April, 1941. During that time everyone connected with the case apparently relied upon the validity of the surrender.

IV.

ARGUMENT

After the reversal by the Circuit Court of Appeals, petitioner filed a motion for a rehearing. In that motion he severely criticised the Appellate Court. That criticism was wholly unwarranted, but it is again indulged in and is made the main ground of this application.

Counsel advanced six reasons why a rehearing should be granted. Mr. Face first argued that the conclusion of the Circuit Court is biased and prejudiced and that it was reached on facts neither argued nor contained in the record before that court. He claims, in short, that they reached a conclusion, and then created the facts to sustain it.

The facts are that the records of the Court of Appeals for the Sixth Circuit and the records of the United States District Court for the Western District of Michigan show that Mr. Abbott was outside of Berrien County on many occasions. (See complete records in *Land Owners Association*, et. al. *vs. G. R. Trust Company*, et. al. case No. 8370 6th C. C. A.) 108 Fed. (2nd)-1016). The Circuit

Court however, did not base its ultimate conclusion upon such facts. That court merely commented upon them. It was, of course, unnecessary to even consider them, because the ultimate question in the case as argued, and as determined by the Circuit Court, was that of *surrender*. They said in part:

> "* * * we reach decision solely upon the view that the statute does not provide an exclusive method of surrender. * * *" (145).

They did not find that Mr. Abbott's absence constituted a surrender. That was established by the evidence showing that petitioner's counsel refused to pay board as required by the Michigan statutes. As Mr. Edwin D. Bolger, United States Marshall, testified,

> "* * * Mr. Face replied to me that they would not pay a dollar for him and that they were through with the fellow * * *" (69).

We point out here that no question as to the statutory method of surrender was raised by Mr. Face at that time. It was not asserted then as the basis for his refusal to pay board. It was and is a pure afterthought.

Counsel never questioned the method of surrender until we got into the trial of this case. The method of surrender was not discussed when payment of board and expenses was requested. That was not the reason given for refusing to pay. Mr. Face raised no question as to how the surrender was made. He merely said, "* * * they would not pay a dollar for him, and that they were through with the fellow* * *" (69).

Of course at that time the case of *Optner v. Bolger* was pending and petitioner's counsel thought he had a good case. He expected to collect the original judgment out of it. This is shown very clearly by his letter, Exhibit A, (122) in which he says, "We take this position for the reason that Mr. Abbott has already escaped from the County, and the liability under the bond heretofore given has become fixed and unconditional and cannot be canceled by any procedure whatsoever."

This letter also effectually answers the entire argument as to the necessity for some written record of surrender.

It is perfectly obvious that if, at the time he was notified, Mr. Face had raised a question as to the method of surrender, the surety's representatives could, if necessary, have taken any other proper steps at once. Not only was no question then raised as to the method of surrender, but everyone apparently relied upon it then and continued to rely upon it from January, 1936 to date of trial, September, 1941.

Paragraph 15 of the affirmative part of our answer, (12-13) sets out the facts relative to the surrender. No reply was filed by plaintiff to these allegations. The method of surrender was never pleaded by petitioner, and the question was first raised by objection during the examination of Mr. Abbott (44).

The record establishes that the then United States Marshall, Mr. Brown, was supervising the obtaining of a capias bond from Mr. Abbott and before the final bond was accepted, Mr. Brown called Mr. Face, submitted the instrument to him, asked if it was all right in form, and when Mr. Face approved it, the marshall then sent the sheriff a telegram that "* * * Abbott could be released, * * *" (89-90). However, the Marshall kept the bond in his own possession.

It is a fair conclusion to say that somebody connected with the original judgment required that the United States Marshall be made a party to the bond as a condition to the release of Abbott. Consequently, we ask whose fault was it that the bond remained in Grand Rapids in the possession of the Marshall? Whose fault was it that it was not in the possession of the sheriff where it should have been? Had it been in his possession, the sheriff could have made an indorsement on it of Abbott's surrender. It is perfectly clear that Mr. Miller, the original sheriff had nothing to do with the bond, and that Mr. Hastings knew absolutely nothing about the matter. If some technicality was omitted, it was the fault of the original judgment plaintiff or his counsel.

Important provisions of the Michigan statutes are these: Section 14734, *Michigan Compiled Laws*, 1929:

> "The sureties in any bond given for the liberties of any jail, *may* surrender their principal at any time before judgment shall be rendered against them on such bond; * * *"

Section 14735, *Michigan Compiled Laws*, 1929:

> "Such surrender *may* be made as follows: The bail *may* take their principal to the keeper of the jail, and upon written requirement of such bail, the keeper shall take such principal into his custody, and thereupon indorse upon the bond given for the limits, and acknowledgement of the surrender of such principal; and such keeper shall also, if required, give the bail a certificate acknowledging such surrender." (Italics ours).

It has been and is our claim that the provisions relating to surrender by sureties to jail limits bond are permissive. The sureties "*may*" do this or that. The statute is remedial. It is one of enlargement; one for their protection. Without it they would be helpless.

We have italicized and emphacised the word "*may*". Had the legislature intended this method of surrender to be exclusive, it is certain they would have used the word "*must*". The "*may*" is permissive; the "*must*" would be mandatory.

But to find that this method of surrender is exclusive is to deny a fundamental right. Surely by executing a jail limits bond, the principal does not thereby forfeit every constitutional and statutory right he might otherwise have. In Michigan and other states one confined to jail, upon a body execution, has a right, after a certain period of time to take what is known as a poor debtor's oath and thereby obtain his release. This too, is a fundamental right. Can it be humanely argued that because a man gives a bond, perhaps for temporary convenience, that he forfeits these rights?

But it is argued by petitioner that the revision of Michigan Laws of 1846 by the legislature abolished the former practice of permitting a principal to surrender. The ommission claimed may have been by the compiler; it may have been by the legislature; or it may have been considered wholly unnecessary to have a statute providing for surrender by a principal because it is generally regarded as a fundamental and a personal right. It existed at the common law and our capias practice comes from the common law. To hold as did the trial court is to deprive a citizen of his constitutional rights, when the trend of legislation throughout the country is to make capias practice more lenient and less hard for the unfortunate defendant.

Any apparent value there might be to the argument about the repeal of the early Michigan statute which provided for a personal surrender is entirely lost for additional reasons. The matter was not presented to the trial court; it was neither briefed or argued before the appellate court. The first mention of it was made in the motion for rehearing and brief filed in the Court of Appeals. They found no merit to the claim.

It is admitted that there was no compliance by petitioner with the statute requesting payment of board in advance. The latter of petitioner's counsel to the United States Marshall furnishes all the evidence of that that is necessary. There was no obligation on the part of Mr. Miller, the original sheriff, to retain Mr. Abbott after refusal to pay his board, and the appellate court so held (142). In fact, he would have been liable in damages had he tried to restrain Abbott.

Section 14756, *Michigan Compiled Laws* of 1929:

> "Whenever in any civil action, any person shall be committed to any jail in default of bail, or by virtue of an execution issued or proceedings founded on a judgment rendered in such suit, the plaintiff or defendant at whose instance such person shall be so imprisoned, shall pay, on demand, to the sheriff or the keeper of the common jail of the county, the ex-

penses of the board and keeping of such person so imprisoned; and the said sheriff or keeper of said jail shall not be required to retain such person any longer in jail than such expenses of said board and keeping shall be paid in advance; nor shall such expenses constitute any charge against the county."

The Michigan Court has been very emphatic in its holdings upon this matter.*

Prior v. Brodie, 49 Mich. 200;
Butcher v. Lovett, 280 Mich. 369.

Under the facts in this case, there is utterly no question about the release of Mr. Abbott and the termination of all liability upon his jail limits bond.

V.

CONCLUSION

(a) It follows that the main argument of petitioner for the allowance of a writ of certiorari falls of its own weight.

(b) The appellate court held, and we contend correctly, that the right of a principal to such a bond to surrender himself is a fundamental and a humane right, and has been recognized since an early time. The quotation by the appellate court from Lord Bacon is most appropriate (144). No statute permitting a voluntary surrender is necessary, and no statute has been found *forbidding it.*

(c) Regardless of the claimed lack of supporting authority, the Court of Appeals reached a proper conclusion. There is nothing about this case needing the supervision by this court of the court below.

In the interests of brevity we have not burdened the court by again citing and quoting from the authorities upon which we have relied. Those of importance are all set out in the opinion below written by Judge Simons (138-145).

We respectfully submit that the petition should be denied.

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